5

No. 92-785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,
Petitioner,

VS.

STATE WATER RESOURCES CONTROL BOARD, et al.,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
WALTER WUNDERLICH
Assistant Attorney General
CLIFFORD T. LEE
(*Counsel of Record*)
Deputy Attorney General
6200 State Building
455 Golden Gate Avenue
San Francisco, CA 94102
Telephone: (415) 703-2013

Attorneys for Respondents

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F. CA 94104 • (415) 362 2300

QUESTIONS PRESENTED

1. Whether attorneys' fees are available under 42 U.S.C., § 1988 for administrative and other proceedings that are fully independent of an action brought under 42 U.S.C., § 1983.

2. Whether attorneys' fees are available under 42 U.S.C., § 1988 for administrative and other proceedings where the moving party has not established that the action brought under 42 U.S.C., § 1983 has materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the moving party.

PARTIES

The petitioner is the Rock Creek Limited Partnership.

The respondents are the State Water Resources Control Board, Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh and Eliseo V. Samaniego.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
OPINIONS BELOW	1
STATEMENT	1
REASONS FOR DENYING THE WRIT	6
I	
THIS COURT'S DECISIONS HAVE ALREADY RESOLVED THE ISSUE RAISED BY THE PETITIONER	6
II	
THE PETITIONER'S FEE CLAIM IS NOT SUSTAINABLE BECAUSE THE PETITIONER CANNOT ESTABLISH THAT ITS DISTRICT COURT ACTION RESULTED IN ANY MATERIAL ALTERATION OF THE LEGAL RELATIONSHIP BETWEEN THE PARTIES	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

Page

California v. FERC, 495 U.S. 490 (1990) 2, 3, 5

Farrar v. Hobby, ____ U.S. ____, 61 U.S.L.W. 4033 (1992) 9, 10

Hewitt v. Helms, 482 U.S. 755 (1987) 8, 9

New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) 6, 7

North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 6 (1986) 7

Pennsylvania v. Delaware Valley Citizens' Council, 478 U.S. 546 (1986) 7

Rock Creek Limited Partnership v. State Water Resources Control Board, 972 F.2d 274 (9th Cir. 1992) 5, 6

Sablan v. Department of Finance, 856 F.2d 1317 (9th Cir. 1988) 9

State of California, et al. v. FERC, 877 F.2d 743 (9th Cir. 1989) 3, 4

Sullivan v. Hudson, 490 U.S. 877 (1989) 8

Webb v. Dyer County Board of Education, 471 U.S. 234 (1985) 6, 7, 8

Statutes

42 U.S.C., § 1983 ..... i, 13

42 U.S.C., § 1988 ..... i, 5

No. 92-785

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

ROCK CREEK LIMITED PARTNERSHIP,
Petitioner,

VS.

STATE WATER RESOURCES CONTROL BOARD, et al.,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 972 F.2d 274. The opinion of the United States District Court for the Eastern District of California is unreported.

STATEMENT

In this case, the petitioner sought relief from the terms and conditions contained in the water right permits issued by the State Water Resources Control Board ("State Board") for the petitioner's hydroelectric power project under two strategies. First, the petitioner filed an administrative petition for declaratory relief with the Federal Energy Regulatory Commission ("FERC"). Second, eight months later, the petitioner filed an action in U. S.

District Court under Section 1983 of the Civil Rights Act seeking relief against the respondent. The district court stayed its proceedings pending the resolution of the administrative action before FERC. Appeals from the FERC proceeding resulted in this Court's decision in *California v. FERC*, 495 U.S. 490 (1990), a decision that confirmed Federal Power Act preemption over conflicting state water right requirements. At issue in this case is whether the petitioner is entitled to attorneys' fees under Section 1988 of the Civil Rights Act for the FERC proceedings and the subsequent appeals, even though such proceedings were fully independent from the district court action.

1. The FERC Proceedings

On April 29, 1983, FERC issued a license for the Rock Creek Project, a hydroelectric facility located in El Dorado County, California, under the Federal Power Act. (Supplemental Excerpts of Record filed with the Ninth Circuit ("SEOR") at 7.) On June 12, 1984, the State Board issued state water right permits for the project. These permits set interim, fishery bypass flow levels identical to those contained in the FERC license. (SEOR at 8.)

On July 9, 1986, eight months prior to the filing of the district court action that is the subject of this petition, the petitioner filed an administrative complaint for declaratory relief with FERC. The complaint argued that the FERC's "jurisdiction over the license and the operation of the project under the license is exclusive and preempts state authority." (SEOR at 22.) On February 13, 1987, the petitioner filed an emergency request with FERC urging the agency to expedite the original petition. (SEOR at 30.) On March 11, 1987, FERC responded by issuing a declaratory order holding that FERC had the exclusive jurisdiction to set fishery bypass flows for the petitioner's project. (SEOR at 37-38.)[1]

---

[1] At no time prior to the issuance of this order did the petitioner serve the State Board with any of its pleadings or did FERC inform the State Board that the jurisdictional question was pending before FERC. (EOR, Tab. 39 at 2.)

On March 16, 1987, the State Board received by mail a copy of FERC's March 11, 1987 order. (Excerpts of Record filed with the Ninth Circuit ("EOR"), Tab 39 at 2.) On March 19, 1987, the State Board amended the petitioner's water right permits to increase the fishery bypass flows above the level established in the FERC license. (SEOR at 42-91.) On April 9, 1987, the State Board filed and served a motion to intervene in the FERC proceeding and a request for rehearing. (SEOR at 12.)

On November 20, 1987, FERC issued an order denying the state's request and affirming FERC's exclusive jurisdiction in setting fishery bypass flows for the petitioner's project. (SEOR at 127.) On December 21, 1987, the State Board filed a petition for review of the contested FERC orders with the 9th Circuit Court of Appeals. (SEOR at 135.)

On June 6, 1989, the 9th Circuit Court of Appeals affirmed the FERC orders. *State of California, et al. v. FERC*, 877 F.2d 743 (9th Cir. 1989). On December 4, 1989, this Court granted the State of California's petition for a writ of certiorari and on May 21, 1990 the Court issued a decision affirming the FERC orders and the preemptive authority of the Federal Power Act over the state's fishery requirements. *California v. FERC*, 495 U.S. 490 (1990). On July 19, 1990, the State Board responded to this Court's decision by amending the fishery requirements in the petitioner's water right permits to conform with the decision. (SEOR at 151.)

2. The District Court Proceedings

On April 9, 1987, the petitioner filed and served its complaint for injunctive and declaratory relief in the district court. Like its administrative complaint that it filed with FERC eight months earlier, the district court complaint specifically contested the new, State Board fishery requirements. (SEOR at 124-125.) However, the complaint also raised claims under Section 1983 of the Civil Rights Act. On May 18, 1987, the district court heard the petitioner's motion for preliminary injunction against the state. Upon completion of oral argument, the district court denied the motion for preliminary injunction. (Reporter's Transcript filed with Ninth Circuit ("RT") at 21.) On September 18, 1987, the

district court heard the parties' cross-motions for summary judgment. (RT at 23.) The district court then took the motions under submission. (RT at 58.)

On January 4, 1988, the State Board disclosed to the district court the concurrent developments in the FERC proceedings by way of a written status report. On April 5, 1988, the district court conducted a status conference to determine the appropriate status of the action in light of the State Board's 9th Circuit appeal from the contested FERC orders. (SEOR at 146.) At the status conference, the district court requested the State Board to consider waiving for the duration of the appeal any possible enforcement action against the petitioner for noncompliance with the state's higher level of fishery protection.

In an April 14, 1988 letter to the district court, the State Board agreed to waive enforcement action in order to ensure "more rapid appellate resolution of the federal-state relationship issue." (SEOR at 143.) However, the State Board agreed to this waiver only "for the duration of the appeal in the *State of California v. Federal Energy Regulatory Commission* . . . action." *Id.* Moreover, the Board's letter limited the waiver with the following conditions:

> "2. The State Board agrees to the waiver of enforcement authority as described in paragraph 1 solely for the purpose of obtaining a stay of the trial court proceedings in this action and, thus, encouraging the prompt resolution of the *State of California v. Federal Energy Regulatory Commission*, 9th Circuit action. This waiver of enforcement authority should not be considered as precedent with respect to the State Board's general enforcement policy over other water right permits. Morever, the waiver should not be considered as precedent with respect to the State Board's general enforcement policy over other water right permits. Moreover, the waiver should not be considered as an admission by the State Board that the bypass flows set forth in Order No. 87-2 are not necessary or otherwise required for the protection of the fishery resources of Rock Creek." *Id.* at pp. 143-144.

In an April 25, 1988 order, the district court affirmed the State Board's temporary waiver of its enforcement powers. The district court then vacated its submission of the cross-motions for summary judgment, stayed all proceedings pending resolution of the state's appeal in *California v. FERC*, and requested the State Board to inform the Court when the appeal became final. (SEOR at 146-147.) The order staying proceedings was subsequently extended to include final action on the State Board's appeal to this Court.

As previously noted, on July 19, 1990 the State Board responded to this Court's 1990 decision in *California v. FERC* by amending the petitioner's water right permits to conform to the decision. On September 14, 1990, the district court dismissed the petitioner's action, including its Section 1983 claim, and entered judgment in favor of the State Board on the grounds of mootness. (EOR, Tabs 68 and 69.) On March 5, 1991, after notice and hearing, the district court denied the petitioner's attorneys' fees motion. (EOR, Tab 80.) The trial court concluded that "[b]ecause no causal relationship exists between this district court action and the invalidation of the Board's order, plaintiff Rock Creek Limited Partnership is not a prevailing party within the meaning of 42 U.S.C. Section 1988 for the purposes of this action." (EOR, Tab 80 at 3.)

On appeal, the 9th Circuit Court of Appeals concluded that the proceedings before FERC and the subsequent appeals were sufficiently unrelated and independent from the district court action to bar the award of fees for these proceedings under Section 1988 of the Civil Rights Act. *Rock Creek Limited Partnership v. State Water Resources Control Board*, 972 F.2d 274, 279 (9th Cir. 1992). The circuit court, however, also concluded that the petitioner had obtained a temporary stay of proceedings before the district court and that this result justified a remand to the trial court for a determination of whether fees should be awarded for the petitioner's activity before the district court. *Id.* at 280. It is from the circuit court's decision to deny fees for the FERC proceedings and the subsequent appeals that the petitioner has filed the pending petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I

THIS COURT'S DECISIONS HAVE ALREADY RESOLVED THE ISSUE RAISED BY THE PETITIONER.

According to the 9th Circuit Court of Appeals, the petitioner's FERC proceeding and the petitioner's district court proceeding were "independent" avenues, either of which "could have resulted in a decision on the question of FERC's exclusive authority". *Rock Creek Limited Partnership v. State Water Resources Control Board*, 972 F.2d 274, 279 (9th Cir. 1992). The FERC proceeding was not a condition precedent to the filing of the district court action, nor was the proceeding an element of the district court's continuing authority on remand. *Id.* The petitioner in this case does not contest the circuit court's characterization of the petitioner's litigation strategy. In at least five decisions, this Court has held that statutory attorneys' fees are unavailable for administrative or other proceedings that are fully independent of the underlying district court action.

In *New York Gaslight Club, Inc. v. Carey*, this Court considered whether work done before state administrative or judicial proceedings could justify a fee award in a federal employment discrimination action under Section 706(k) of the Civil Rights Act of 1964. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980). In *Carey*, this Court concluded that a fee award was appropriate because the federal statute required the "exhaustion of state or local remedies". *Id.* at 64. According to the court, "only authorization of fee awards ensures incorporation of state procedures as a meaningful part of the Title VII enforcement scheme." *Id.* at 65. The *Carey* decision therefore authorized fee awards only where the alternate administrative proceedings were "mandated" by federal statute. *Id.*

In *Webb v. Dyer County Board of Education*, this Court expressly affirmed the view that attorneys' fees under Section 1988 of the Civil Rights Act were not available for work involving independent administrative proceedings. *Webb v. Dyer County Board of Education*, 471 U.S. 234 (1985). At issue in *Webb* was whether fees were available for work involving the school board

proceedings that preceded the filing of a Section 1983 claim. *Id.* at 239-240. In response, this Court expressly rejected an extension of *Carey* to include independent proceedings and held that:

> "Because § 1983 stands "as an independent avenue of relief" and petitioner "could go straight to court to assert it," ibid., the School Board proceedings in this case simply do not have the same integral function under § 1983 that state administrative proceedings have under Title VII.
>
> Congress only authorized the district courts to allow the prevailing party a reasonable attorney's fee in an "action or proceeding to enforce [§ 1983]." Administrative proceedings established to enforce tenure rights created by state law simply are not any part of the proceedings to enforce § 1983, and even though the petitioner obtained relief from his dismissal in the later civil rights action, he is not automatically entitled to claim attorney's fees for time spent in the administrative process on this theory." *Id.* at 241.

The *Webb* decision therefore unequivocally rejected the petitioner's contention that fees are available under Section 1988 for work involving independent proceedings, such as the petitioner's FERC proceedings and the subsequent appeals.

The petitioner has attempted to buttress its fee argument by referencing three subsequent decisions of this Court. However all of these decisions affirm the holding in *Webb*. In *Pennsylvania v. Delaware Valley Citizens' Council*, this Court affirmed a fee award for work before state and federal administrative agencies because, "consistent with our opinion in *Webb*", the work was in furtherance of the district court's consent decree and was "of a type ordinarily necessary to secure the final results obtained from the litigation." *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 561 (1986). In *North Carolina Department of Transportation v. Crest Street Community Council*, this Court again affirmed the *Webb* decision and limited fee awards to administrative proceedings "both useful and of a type ordinarily necessary to advance the civil rights litigation." *North Carolina Department of Transportation v. Crest Street Community Council*, 479 U.S. 6, 15 (1986).

Finally, in *Sullivan v. Hudson*, this Court again found that attorneys' fees were only appropriate as to work directly related to the judicial action in which fees have been sought. *Sullivan v. Hudson*, 490 U.S. 877, 888-889 (1989). According to the Court in *Sullivan*:

> "Our past decisions interpreting other feeshifting provisions make clear that where administrative proceedings are intimately tied to the resolution of the judicial action and necessary to the attainment of the results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded." *Id.* at 888.

In approving the fee award, the Court observed that the administrative proceedings were "mandatory" and were crucial to the "vindication of [respondent's] rights." *Id.* at 889.

The petitioner's effort to obtain attorneys' fees for their work involving the FERC proceedings is therefore fully inconsistent with all available case authority from this Court. The circuit court in this case found that the FERC proceedings were fully independent from the district court action. As this Court established in *Webb*, independent administrative proceedings that are not linked to the federal court action cannot provide grounds for fee generation.

II

THE PETITIONER'S FEE CLAIM IS NOT SUSTAINABLE BECAUSE THE PETITIONER CANNOT ESTABLISH THAT ITS DISTRICT COURT ACTION RESULTED IN ANY MATERIAL ALTERATION OF THE LEGAL RELATIONSHIP BETWEEN THE PARTIES.

In *Hewitt v. Helms* this Court recognized that a "prevailing" party within the meaning of Section 1988 of the Civil Rights Act must establish that his or her civil rights action resulted in a material alteration of the other party's conduct to the prevailing party's benefit. *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). In *Hewitt*, a prisoner objected to a form of restrictive custody on due

process grounds. *Id.* at 757-758. In the course of the litigation, the prisoner received a positive declaratory ruling from the court of appeals on one aspect of his due process claim, the claim challenging the use of unidentified informants in misconduct proceedings. *Id.* at 758. While the case was pending, the prisoner was released on parole and, eventually, the prison officials altered their disciplinary procedures regarding the use of unidentified informants. *Id.* at 759. Despite this judicial victory, this Court denied the prisoner's attorneys fee claim. As this Court explained:

> "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has "prevailed" in his suit, because he has obtained the substance of what he sought. Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id.* 761.

Thus, this Court has confirmed the view of the 9th Circuit Court of Appeals that a successful Section 1988 claim for fees must establish that the "lawsuit was causally linked to the relief actually obtained." *Sablan v. Department of Finance*, 856 F.2d 1317, 1325 (9th Cir. 1988).

In the Court's recent decision in *Farrar v. Hobby*, the Court has further amplified on this causation requirement:

> "[T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought. *Hewitt, supra*, at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt, supra*, at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Rhodes, 488 U.S., at 4. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the

> plaintiff into a prevailing party. *Garland, supra*, at 792-793. *In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Farrar v. Hobby*, ____ U.S. ____, 61 U.S.L.W. 4033, 4035-4036 (1992) (Emphasis added).

In the present case, the petitioner has not received *any* benefits from its district court action, aside from a temporary stay of proceedings, nor did the petitioner's Section 1983 claim result in the "material alteration of the legal relationship of the parties." As the circuit court in this case established, the petitioner obtained its legal relief under the Federal Power Act through the FERC proceedings, proceedings that were fully independent of the district court action. The petitioner therefore cannot be considered a prevailing party under Section 1988 for purposes of its district court claims.

CONCLUSION

For the above reasons the respondent State Board respectfully requests this Court to deny the petition for a writ of certiorari in this case.

Dated: December 29, 1992

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
WALTER WUNDERLICH
Assistant Attorney General

CLIFFORD T. LEE
(*Counsel of Record*)
Deputy Attorney General

Attorneys for Respondents